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THE WEBSTER CASE.

The proximity of the scene cannot have invested the Webster case with such extraordinary interest at home, as to betray us into serious error in regard to the attention which it has excited elsewhere. Probably no criminal trial ever so completely engrossed the attention of so many people. The first announcement of Dr. Webster's arrest produced an intense excitement, and was circulated with an almost electric rapidity throughout Boston.[1] But the excitement was not confined to Boston, or its environs. Throughout the Commonwealth, and throughout the Union, the most intense interest was manifested; and the Herculean energy of the press, and the untiring activity of the telegraph were unequal to the demands of the public curiosity. This state of things is referable to various causes. The social position of the alleged murderer and his victim, undoubtedly, contributed largely. And the revolting details which were naturally *suspected* (not proved) to have at-

[1] A gentleman remarked to us, in this connection, that on the morning on which Dr. Webster's arrest was announced, the news penetrated every part of the city so instantaneously, that although he himself heard of it at a very early hour, he did not subsequently see an individual who had not heard of it. Our own experience was exactly the same.

tended the murder, if murder it was, lent an additional interest. But more than all this was required to paralyze business, to monopolize conversation as well by the fireside, as on the exchange, and to sustain a constantly increasing excitement through a period of more than four months. We think that the intensity of the public interest in the matter is referable, more than to any other one cause, to the almost dramatic regularity with which the different incidents connected with this dreadful tragedy were unfolded to the public. A large part of the dramatist's art consists in arrangement. It will not do to let every thing come upon his audience at once. Otherwise, his finest characters would be sacrificed in the confusion, and the ill-judged blending of incongruous elements, would, at best, produce only a farce. To obviate this, the devices of his art are resorted to. The scenes are changed. Unimportant characters are employed to fill up an occasional gap. And when a leading part of the play is approached, the mind of the audience is prepared for it by skilful contrivances, as the weird sisters are introduced in Macbeth to foretell that short-lived and empty greatness, which only witchcraft could foresee. Thus the drama vindicates itself by its faithfulness to the ordinary course of nature. It has been Dr. Webster's misfortune to be brought before the public in connection with facts, which have been disclosed in such a sequence, and in such combinations, that had an artist arranged their development, he could, in no way, have more completely engrossed the public attention. We do not refer particularly to the publication of such facts as affected Prof. Webster, but to all the circumstances connected with Dr. Parkman's disappearance. Nor is there any ground for any insinuation in regard to the information which the public have received. We speak of this merely as Prof. Webster's misfortune.

In this connection, let us glance briefly at the long train of circumstances which have led to Prof. Webster's conviction, and the times and modes in which they became known. We shall thus be able to comprehend what has

controlled public opinion. This is of the highest importance, for however much our system of criminal procedure may be eulogized, we cannot escape the thought that Prof. Webster has been tried before the bar of public opinion, and that it was the strength of the public conviction of his guilt, rather than the perfectness of the case set up by the government, which secured an unfavorable verdict.

Dr. George Parkman, a peculiar, but eminently respectable citizen of Boston, suddenly disappeared. As he was a very punctual man, the disappearance was immediately noticed, and as he was generally known in the community, and had extensive and influential family connections, unusual efforts were forthwith used in searching for him. The whole available police force of the city, together with such auxiliaries as the most unlimited means could secure, were immediately put upon the trail. Large rewards were offered. Handbills were posted at every corner. The river was dredged. The woods were searched. And thus, for a whole week, the city was kept in perpetual agitation. Great sympathy was felt for the family of the missing man, and the public curiosity was excited to the highest pitch. At first, there was an unwillingness to believe that there could have been any foul play, and vague rumors to the effect that Dr. Parkman was sometimes liable to sudden aberrations of mind were relied upon. Gradually, after people had been dwelling on the subject, more serious apprehensions were entertained, and on Monday, Nov. 26, although it does not even now appear that any one, except Mr. Littlefield, then entertained any suspicion of the true state of the case, a second handbill was put forth, predicated upon a suspicion of murder, and offering an additional reward. By this time, one great fact, ***which has not yet been proved***, the fact that Dr. Parkman was murdered, had become so positively assumed by the public, that we verily believe nothing but his reäppearance could have eradicated it. Thus one point had been carried without proof. Next to assuming that a murder had been committed, it was necessary to assume that some person had committed it.

And, at this stage, again, every one was at a loss. The story which had obtained most extensive currency was, that Dr. Parkman was last seen crossing East Cambridge bridge, in company with an Irishman, and it was suggested that he was on his way to the Registry of Deeds to discharge a mortgage, which was not however done. This story cannot be traced to any authentic source. It cannot be traced to Dr. Webster, nor does it appear that it was a contrivance of the police to divert public attention from its true object. At any rate, people lost their faith in it, after it was found that the Irishman was not forthcoming. And then they cast about for some other theory. It was in this state of uncertainty, when the public attention was beginning to revert to the Medical College, that Dr. Webster was arrested. In view of all that fearful combination of circumstances which has since ruined him, we doubt whether any time could have been more unfortunate. Had he been suspected at once, and arrested before the public mind had accustomed itself, by hearing only one side, to the idea that murder had been committed, the most extreme verdict which could have been extorted would have been one of manslaughter. Had the excitement been permitted entirely to die away, it would probably have been as difficult to satisfy the public, as it now is whenever any one is arrested on suspicion of having been concerned in the Manchester murder. We think it must be conceded that the time of his arrest was a most unfortunate one. But this was not all. The important facts "leaked out," one at a time, at sufficient intervals, to make their proper impression upon the public. In the mean time, not one word was heard from the prisoner. He was brought before the Police Court, but, in opposition to what we believe is almost universally considered the true policy, *he waived an examination.* The important elements of the case were obtained indirectly, and although they have since proved to have been, in the main, correctly stated, yet they acquired an additional gloom from the haze in which they were enveloped. Meanwhile, the government were fortifying them-

selves by a stealthy and inquisitorial process which was worthy of Louis XI. A coroner's inquest, which was held in secret, manifestly against justice, and we fear against law, perhaps exceeded their jurisdiction by publishing a verdict charging him with murder, but withheld all the evidence. As a natural result, the restless public, whose curiosity is much more keen than its sense of justice, took it for granted that he was guilty, and were only at a loss to know how to prove him so. The finding of the grand jury was, necessarily and properly, the result of a secret and *ex parte* hearing, but in the excited state of the public mind, it helped to swell the general current. A number of trivial circumstances operated unfortunately for the prisoner. Three most distinguished members of the Suffolk bar, who were expected to have led the defence, successively withdrew, and a *piquant* remark, attributed to one of them, fully justified by its effect, the *mot* of Mirabeau, that "words are things."

This naturally resulted in a complete commitment of public opinion against Prof. Webster. So far as public opinion was concerned, at the commencement of the trial, the burden of proof was upon him to vindicate his innocence. The great point, therefore, to be considered in criticising the case, is how far public opinion may be said to have controlled the trial; whether, to speak the plain truth, the unfavorable verdict of the jury was extorted by public opinion, directly or indirectly, or whether it was the natural and necessary result of a calm and thorough investigation of the case. With the abstract question of Dr. Webster's guilt, we shall not meddle. We have freely expressed an opinion upon that question,—an opinion which was formed before the trial, and which the events of the trial did not induce us to alter. The only question to be considered is, whether the opinions of the Court, of the counsel on both sides, and of the jury, was not formed at a period equally early. We are afraid that they were. And although some responsibility may attach to the assertion, we feel bound to say, that all the proceedings at that trial

indicate an overwhelming and paralyzing sense of the prisoner's guilt, which affected, to an unfortunate extent, the medium through which the evidence was viewed.

It is due to those concerned to say, that all usual and unusual precautions were adopted to secure an impartial jury, wholly unbiased as to the merits of the case. What are such precautions worth in such a trial? We have already alluded to the instantaneousness with which the intelligence concerning this case, was communicated in every direction. And we venture to say, that on the commencement of Prof. Webster's trial there was not a house in Massachusetts, where the question had not been discussed. Our people are intelligent. They can read what is printed. They are inquisitive and curious, as every body knows. Does any one imagine that they would let such things occur, and not talk and argue about them? It may be said that a jury was obtained without difficulty. That fortifies our position. For if a jury was obtained so easily, the irresistible conclusion must be, that they were men with the prejudices and opinions which pervaded the community. On such an occasion, men deceive themselves, and do not appreciate the force and direction of their own impressions. Besides, although there are undoubtedly many who shrink from the responsibility of a capital trial, there are also many who are quite ready to take a conspicuous part in the ceremony of an important trial. Their vanity is appealed to, and they easily persuade themselves that they are free from any bias. Thus it must always result that, to a certain extent, in exciting cases, the prejudiced verdict of public opinion has its influence upon a jury. This is an evil which cannot be avoided.

In regard to the influence of public opinion upon the Court, we would speak with becoming diffidence. The Judiciary of this Commonwealth have always maintained, in every crisis, the most irreproachable character for integrity and independence, nor would we be instrumental in casting the slightest aspersion upon any member of the bench. The public confidence remains unshaken. But the

course of the Court in Prof. Webster's trial clearly indicates the existence and extent of an influence which was unfavorable to the prisoner. It was this. Prof. Webster had occupied a conspicuous position in society, and it was very easy to raise a cry against the Court if any unusual leniency should be allowed to him. This evidently forced the Court into the opposite extreme. Perhaps we should not say *extreme*, but it made them *over cautious*, and inclined them to hold all doubtful points against the prisoner. In the next place, the excitement had become so intense, that a proper regard for the peace of the community urgently required that the whole proceeding should be closed at the earliest practicable period. There was great danger of a division of the jury, and if the jury divided once, they might divide again and again, until, as in the unfortunate Desha case, a pardon might plausibly be urged as the only means of terminating the controversy. This, clearly, was to be avoided, if it could be done with justice. The Court evidently thought it necessary to secure an unanimous verdict, and such a verdict as would correspond with public opinion. This is the only way in which we can account for the extremely *argumentative* character of the charge of the Chief Justice.

The same combination of influences would naturally operate upon the prosecuting officers, and they, acting on only one side of the case, would be apt to give full scope to their previous opinions. The manner in which the prosecution was conducted is justly admitted to display the very highest degree of professional ability. The new Attorney General has established a most brilliant reputation. Nor ought we to omit alluding to his associate, who, in an humble way, by his faithful and diligent preparation of the cause, has also gained unwonted credit with the whole profession. But, at the same time, it must be admitted that the current of public opinion was in their favor. And they were urged on to an irresistible vehemence of attack, which in our humble opinion is not required of prosecuting officers. In illustration of this, we would merely refer to the

mode in which the Attorney General pressed before the jury numerous facts and circumstances which might properly enough have great weight upon public opinion, but which clearly do not constitute evidence upon which a man is to be convicted capitally. Of this nature are the allusions of the Attorney General to Dr. Webster's course when arrested, and, during the progress of the trial, to the fact that he waived an examination at the Police Court, to the circumstance that Dr. Parkman's will had been admitted to probate, (clearly *res inter alios acta*,) and most of all to the assertion, made when it was too late to contradict it, that but a part only of the witnesses summoned to prove the so-called *alibi* of Dr. Parkman had been put upon the stand. And this is to be regretted the more, inasmuch as the Attorney General seems to entertain the same views of the duty of a prosecuting officer with ourselves.[1]

The counsel for the defence manifested great embarrassment in the management of their case. And this was so apparent, that we cannot but think that it tended more than any thing else to injure the prisoner's case in the estimation of the public and of the jury. In view of this, some of the penny papers of the city have reproached them with considerable violence, and, at a distance, the journals of greater respectability have joined in the cry. Our attention

[1] In Mr. Clifford's opening, the following passage occurs: — "I desire gentlemen, here in the very opening of these proceedings, distinctly, and under the sense of the responsibility which rests upon me, to apprise you of the view that I take of my duty in the case. I regard it, gentlemen, to a great extent, in its essential character, as a judicial one. I am here to aid and assist you, as well as I am able, in arriving at the truth. The too common idea of the functions of a prosecuting officer, that he is to press a prosecution beyond what any fair-minded seeker after truth would press it, I repudiate and disavow. I have always done so. And if such a demand were made upon me by the supposed exigencies of my office, I certainly would not hold that office for a single hour. I am here to represent the Commonwealth, to see that, as far as in me lies, the justice of the Commonwealth is vindicated, and the rights of every person who is charged with violating it no less protected. I shall endeavor, therefore, to perform that duty with fairness to this prisoner, and fidelity to the community and the Commonwealth, which you and I alike represent here."

has also been called to a pamphlet which purports to come from a member of the New York Bar, a very flippant and unfair production, which indulges in the same strain. This is uncalled for, and unjust. If their client had a bad case it was not their fault. Neither was it their duty to attempt to shield him, by diverting the current of opinion against innocent parties. An unscrupulous advocate might, perhaps, have raised a storm of indignation against Littlefield, by perverting and distorting evidence, by stormy ejaculations and protestations before "the Omniscient God" of his client's innocence. But, certainly, such reckless extravagance is not required by any true rule of professional conduct. It is generally expected by the mob, and it is so generally adopted by criminal lawyers, that, if not adopted, the public verdict is unfavorable to the prisoner from that very cause; and a jury is influenced in the same way. This is most lamentable, for it would seem to throw upon the most high-minded advocate the revolting task of contriving in every instance the wildest and most improper line of defence. The English press has been employed, for the last few months, in discussing the professional conduct of Mr. Charles Phillips in the Courvoisier case. We have given the details of that affair to our readers, and we shall not now repeat them. But we only allude to it to say, that had Dr. Webster's counsel adopted the tactics of the English barrister, they might have saved their client; nor do we believe that the world would have regarded them with less favor on that account. So wanton and unreasonable is that fickle despot, public opinion! For the honor of our bar, we are glad that they did no such thing, and all the lampooners of New York and Philadelphia cannot harm them. They are gentlemen of eminent reputation for professional learning and skill. They have both had long experience in criminal practice,—one of them, at this time, a distinguished member of the Senate of the Commonwealth, having held the office of District Attorney of the Middle District for several years, and afterwards, of Judge of the Court of Common Pleas, which Court has exclusive jurisdiction in all criminal cases, not capital.

But although it is a grateful task to vindicate the course of members of the profession, against calumnious aspersions, our present task is of a different character. Because, in opposition to the too common practice, the counsel merely confined themselves to their case, instead of invoking heaven, or getting up a theory of somnambulism, or some similar extravagance, the public and the jury [1] seem to take it for granted that they were satisfied their client was guilty. It is, in this way, that by attaching importance to conduct, which, according to legal rules, is not to be discussed at all, that verdict seems to have been obtained.

This leads us to consider, briefly, the conduct of the jury. And we are free to say, that, according to the published letter [2] of one of their number, they do not seem to have discharged their duty as became them. We have no doubt they were deeply impressed by the responsibility of the occasion. We think that they were *overwhelmed* by it. That they were conscientious, we shall certainly not dispute; and it would be irreverent to deny that their frequent prayers ascended from as pure hearts and fervent spirits, as ever, in old times, did the prayers of devout Puritans, while burning witches and hanging Quakers to the glory of God. But that Dr. Webster's jury were any calmer than our ancestors in the seventeenth century, we cannot believe for a moment. They do not seem to have discussed the question with the calmness which became them, but without consideration, without reflection, under the influence of that stupor which a fortnight's confinement, and the painful

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[1] In the published letter of one of the jury, the following passage occurs:— "When the witnesses for the defence had given in their testimony, and the counsel for the prisoner announced the evidence on their part closed, a feeling of pain and anguish must have come over the mind of every juror. 'What! can no more be said, — no more be done in behalf of the unhappy prisoner? Is that the evidence — the *only evidence* on which we are to place our verdict of *Not Guilty?*'" This looks almost as if the sapient jury thought the burden of proof was on the prisoner. We hope the Court looked a little deeper into the matter.

[2] The publication of this letter was, most clearly, improper.

excitement of a court-room induced, they seem merely to have reflected back the impressions given them by the Attorney General and Chief Justice. It was not their deliberate verdict upon the law and evidence. It would have been proper to have taken a vote by ballot, thus giving to any dissenting juror, the opportunity of manifesting his dissent without running the gauntlet between his excited fellows. But no. In the jury-room, as well as out of doors, the *vis major* of public opinion was brought to bear with terrific energy. Individual opinions and individual doubts quailed beneath the pressure. Perhaps we are severe. But if there is any duty which the friends of law owe to the public, it is to vindicate individual right against the tyranny of the mass; and when a jury trial is to be debased into a mere machine for developing, in a more concentrated form, the malevolent essence of public opinion, it is our duty to protest against it. If it be urged that the jury acted conscientiously in the discharge of their duty, and we have no doubt that they did, — for the published letter which has been permitted to remain uncontradicted, proves conclusively that they meant to do right, — the matter has even a worse aspect. For it would seem to demonstrate that a jury taken from the body of the county, with the ordinary frailties and imperfections of mankind, are unequal to the task which this jury were called upon to perform. This is the result to which we fear that we must come. We cannot but think, after reading the juror's letter with care, that they must have reasoned somewhat in this wise. "Before we were empanneled, every thing looked as if Dr. Webster was guilty. What have we heard to justify us in finding a verdict of not guilty?" — thus throwing the burden of proof entirely upon the prisoner.

In this connection, let us briefly call attention to another point. In empanneling the jury, the Court propounded three questions to those summoned. Two of these questions are required by the statutes of the Commonwealth.[1] The third — in regard to scruples upon the subject of capi-

[1] Rev. St. ch. 95, § 27.

tal punishment — is not required, nor do we know how to justify it. If a juror has such scruples as the question would indicate, he is guilty of perjury if he takes an oath to try the case upon the law and evidence, with any mental reservation on account of the character of the punishment. To this it will be answered, that such an oath is no security. Very well, the oath is the only test which human ingenuity can devise, and it does not become a lawyer to maintain its want of efficacy. We do not object to government's proving *aliunde* a morbid state of mind which would incapacitate a juror. The government and the prisoner should each have that right. But it is a hard rule which allows the Court to winnow from the jury every spark of humanity, by systematically propounding a question not contemplated by any statute. It is a vulgar error that the English law excludes butchers from the jury-box. This error results from a public conviction that the nature of their employment blunts their sensibilities. Why, then, would it not be fair for the Court to ask each juror, whether his ordinary avocations rendered him so familiar with scenes of suffering as to extinguish the original sensibilities of his nature? Yet, if this course were adopted, we fear that some would say that it undermined the bulwarks of the Constitution. But it would be no more irregular than the third question usually propounded by the Court.

Let us recur to the course of the Court. Several minor questions were raised, not worth attending to now, but upon two points we would most humbly dissent from the ruling of the Court. In the first place, as to a *view* of the premises. It appears that upon the morning of the second day of the trial, the jury were engaged in examining the Medical College. We are not sure that it is any where so reported, but we know it to be true, that the junior counsel on each side accompanied them in that examination. The practice, hitherto, has certainly been to send out the jury in charge of sworn officers,[1] whose duty is merely to exclude

[1] Upon the trial of the Knapps, in Salem, in 1830, a view was refused by the Court.

external influences, not to explain the case. But in this instance, the novel expedient was adopted of sending the counsel to explain matters. True, both sides were represented, but the Court was not. Who then could check the counsel on either side if they transgressed their province? As well might the counsel on each side be sent into the jury-room to relieve a discordant jury. It should, moreover, be remembered, that this view was had before any evidence was submitted in regard to the Medical College, and that, consequently, the jury, instead of listening to that evidence with unbiased minds, had received previously all the unfavorable impressions which an examination of the gloomy laboratories could not fail to give.

In the next place, the whole community shudders at the law of malicious homicide as expounded by the learned Chief Justice:

"Now gentlemen, there are two things to consider. From the law which I have read to you, it appears that if two persons meet, and one voluntarily destroys the life of the other, and no evidence appears, either in the testimony brought to convict him, or in that produced in his behalf, to show provocation, or heat of blood, it is held to be murder, or homicide with malice. I have stated that malice may be either implied or expressed. Malice express is where there is evidence of design, in the previous acts or conduct of the accused.

"Murder by poison must be by express malice, because there must have been preparations previously. But whether malice, in any case, be express or implied, it is always murder, if the homicide be voluntary, and not death produced in heat of blood.

"There are two theories on which this is thought to be murder. One is, that it was by express malice; and the other is, that it was by implied malice; that is, if the express malice is not proved, and if the mitigation to manslaughter is not proved, still, in cases where there is not accident or suicide, it is murder by implied malice."

This point of law, unfortunately, is not new in this Commonwealth.[1] It was held in *Peter York's* case, and it is generally admitted as good law elsewhere.[2] It is also to be

[1] 7 Law Rep. 580.

[2] The New York Code of Procedure adopts this principle in a most startling form.

"§ 1779. The following presumptions and none others are deemed con-

said, that had our legislature entertained views different from those set forth in *Peter York's* case, ample time has since elapsed for the prevention of it by positive statute. But nothing of this kind has been done, and the Court would seem to be bound by their previous decision. It is, however, much to be regretted, that the manly views contained in the dissenting opinion of Mr. Justice Wilde, could not be adopted as containing the true rule of law.[1] Our legis-

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clusive: — '1. An intent to murder from a deliberate use of a deadly weapon, causing death within a year,' " &c. &c.

And in the vicinity of Montreal, as we perceive by the following extract from the correspondence of a New York paper, the same doctrine is adding fuel to the flame now caused by the collision of different races.

"INGRAM CONVICTED OF MURDER. — The Roman Catholic Irish population has been much irritated by the conviction of a man named Ingram for murder. The man was in the midst of some Irish Orangemen, when a scuffle ensued at a religious procession, in which Ingram and some other Irish Catholics joined. From that time till the night of the alleged murder, Ingram underwent a series of intolerable persecutions. His crops were destroyed; his fences stolen; his apple trees girdled; his horses and cattle maimed, and his house repeatedly attacked. Goaded to madness he threatened to shoot the first man he caught on his premises at night, and unfortunately for himself, he did so, killing a man named Watson on the spot. But all the outrages on his property were proved on his trial, and it was also proved that the night was so dark that he could not distinguish the person of the man at whom he fired, so that there was none of *malice prepense* against an individual which the English law holds as necessary to be entertained before a wilful murder can be said to have been committed. The circumstances were altogether very extenuating, and it is the general opinion that the Judges should have directed the jury to give a verdict of manslaughter only. The Irish are very angry, and some of them, who were standing near the court-house when the Court broke up, hooted the Solicitor General, himself an Irish Roman Catholic, who conducted the prosecution for the crown, and one of them knocked his cap over his eyes. The sentence of death will probably be commuted by the government into imprisonment for life, or a long term of years in the penitentiary."

1 "Taking into consideration all these authorities and *dicta*, and the statements of the law of homicide by the writers on criminal law, I am of opinion that the following conclusions are maintained on sound principles of law and manifest justice: 1. That when the facts and circumstances accompanying a homicide are given in evidence, the question whether the crime is murder or manslaughter is to be decided upon the evidence, and not

lature has not yet adjourned, and we confidently hope that, by some enactment, they will modify the rigor of this rule.

One other point, touching the sufficiency of the fourth count, was considerably discussed, but there is probably no great division of opinion in the profession on that question. Nevertheless, we cannot suppress our astonishment at the following passage in the charge of the Chief Justice:

"It is said, that there are various forms of indictment adapted to many of the modes in which death may be inflicted. But is not science continually discovering new modes? Suppose, in the chemical laboratory, a person might be held fast, while chloroform was placed over his mouth, until he dies. Suppose such a case has never before occurred. *Shall such a party escape on that account?* I think not."

If this does not contain a suggestion in about as plain language as the Court could use, that, in their opinion, Dr. Parkman was killed by chloroform, we do not understand the meaning of words. It is most extraordinary, when we remember that no evidence had been introduced in regard to chloroform. Even the Attorney General said,

"Why, it is suggested that the lasso might have been cast around his neck. Was there any evidence before the grand jury which could justify them in saying, upon their oaths, that this was the way in which the murder was committed? It is perfectly true, that a galvanic battery might be so prepared as that, when a man is walking over the wires, he shall be prostrated, and deprived of consciousness. But we must have evidence of it."

These strong suggestions by the Court seem to go beyond its legitimate province, and we fear had too much influence upon the jury.

In conclusion, for, although there are many other points of interest to the profession connected with this

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upon any presumption from the mere act of killing. 2. That if there be any such presumption, it is a presumption of fact, and if the evidence leads to a reasonable doubt whether the presumption be well founded, that doubt will avail in favor of the prisoner. 3. That the burden of proof, in every criminal case, is on the Commonwealth to prove all the material allegations in the indictment; and if, on the whole evidence, the jury have a reasonable doubt whether the defendant is guilty of the crime charged, they are bound to acquit him." Dissenting Opinion of WILDE, J. in *Commonwealth* v. *York*, 9 Metc. 133.

case, our limits will not permit us now to recur to them, we feel that upon the evidence fairly before the jury, the prisoner ought not to have been convicted of the crime of murder. More than this we need not say. But it may not be improper to add, that this is a result which has been arrived at only after a careful examination of the evidence. Our impressions, upon first hearing the verdict, were decidedly otherwise. We greatly fear, now, that that verdict was the result of a preoccupied public opinion, which was brought to bear most violently upon the Court, the counsel, and the jury, and that while not the slightest reproach can be thrown upon any concerned, the intensity of the public excitement prevented a fair trial.

Recent English Decision.

Court of Queen's Bench. Sittings in Banc after Hilary Term.

SHAW *v.* THE YORK AND NORTH MIDLAND RAILWAY COMPANY. — February 24, 1849.

Declaration in case stated that defendants were proprietors of the Y. and N. M. Railway, and of certain carriages for the conveyance of passengers, cattle, and goods and chattels upon the said railway for hire; that they received nine horses of plaintiff to be safely and securely carried in the carriages of defendants by the railway for hire; and that thereupon it was the duty of defendants safely and securely to carry and convey and deliver the horses of plaintiff; and then averred the loss of one by reason of the insufficiency of one of the carriages. It appeared, that, when the horses were received, a ticket was given to plaintiff, stating the amount paid by plaintiff for the carriage of the horses, and the journey they were to go, and having at the bottom the following memorandum: — "N. B. This ticket is issued subject to the owner's undertaking all risks of conveyance whatsoever, as the company will not be responsible for any injury or damage, however caused, occurring to horses or carriages while travelling, or in loading or unloading;" —

Held, that the terms contained in the ticket formed part of the contract for the carriage of the horses; and that the alleged duty of defendants, safely and securely to carry and convey the horses, did not arise upon that contract.

THIS was an action on the case, tried before Alderson, B., at the Lent Assizes for Yorkshire, in 1848. It appeared that a horse, being one of nine, which was put in the carriages of the defendant corporation, received a fatal injury from a defect in one of the horse boxes in which it was placed, which defect was indicated to the servants of the corporation, who tried, unsuccessfully, to cure it. It also appeared that the plaintiff and his servant travelled in the same train with the horses, and that a ticket was given to the plaintiff when the horses were received, which contained, in addition to a receipt of freight money, and a description of the distance for which they were to be transported, the following memorandum:

"N. B. — This ticket is issued subject to the owner's taking all risks of conveyance whatsoever, as the Company will not be responsible for any injury or damage, however caused, occurring to horses or carriages while travelling, or in loading or unloading."

The learned Judge held that the ticket was the proper evidence of the contract, but that a third plea which set forth the limitation of the contract contained in the above memorandum, did not really state the legal effect of the contract; for according to *Lyon* v. *Mells*, (5 East, 428,) every such contract is open to the exception of injury or damage arising from the insufficiency of the carriage provided by the defendants, and that if the ticket limited the common law liability of the carrier, yet it did not support such a plea of limitation of the contract, because the limitation was without the exception. The jury found that the insufficiency of the defendants' carriage caused the horse's death, and rendered a verdict for the plaintiffs, leave being reserved for the defendants to move for a nonsuit.

In the following Easter Term, (April 15,)

Knowles obtained a rule nisi accordingly, or for a new trial, on the ground of misdirection, citing Lord Ellenbo-

rough, *Nicholson* v. *Willan*, (5 East, 507, 512); *Latham* v. *Rutley*, (2 B. & C. 20); *Palmer* v. *The Grand Junction Railway Company*, (4 Mee. & W. 749; 3 Jur. 559.)

In Hilary Term,[1]

Martin and *Dearsley* shewed cause. — First, there is no variance between the contract as stated in the declaration and the contract as proved. The legal import of a contract to carry, is to carry safely and securely, "regard being had to the relative rights and duties of the parties." Tindal, C. J., in *Rose* v. *Hill*, (2 C. B. 877, 888.) Secondly, as to the effect of the notice stated in the third plea, it is the duty of carriers to use due and ordinary care, and to provide fit and proper carriages. The object and effect of a notice limiting their liability, is to protect them against unexpected and unavoidable accidents; *Birkett* v. *Willan*, (2 B. & A. 356); *Bodenham* v. *Bennett*, (4 Price, 31); but they are, notwithstanding such notice, liable for gross negligence. *Wyld* v. *Pickford*, (8 Mee. & W. 443, 460, 461); Story on Bailments, § 562, citing *Lyon* v. *Mells*, (5 East, 428); Abbott on Shipping, 342, 7th ed. Again, there is a variance between the contract and the statement of it in the third plea, because that statement omits the exception of gross negligence. *Latham* v. *Rutley*, (2 B. & C. 20.) And, further, the liability of the defendants contained in the receipt, is no qualification of the contract. (*Sleat* v. *Fagg*, 5 B. & A. 342.) [They also referred to sects. 4 and 8 of stat. 11 Geo. 4, and 1 Will. 4, c. 68.]

Knowles, *J. Addison*, and *T. Barstow*, contra. — That such a declaration as the present, although in form an action on the case, and although it does not specifically charge the defendants as common carriers, is virtually an action *ex contractu*, was decided in *Dale* v. *Hall*, (1 Wils. 281.) Non-joinder might have been pleaded to it in abatement. *Powell* v. *Layton*, (2 T. R. 365); *Max* v. *Roberts*, (12 East, 89.) The declaration is founded on a

[1] Jan. 22, before Lord Denman, C. J. Patteson, Coleridge, and Wightman, J. J. The argument was continued on Jan. 25.

contract, indeed, whether that contract be such as arises by general custom between a common carrier and the person delivering goods to him for carriage, or it be a more special contract of bailment arising by agreement between the parties. In the present case, the contract relied on in the declaration as the ground for the alleged duty, is larger than the contract which was proved at the trial. Suppose, for the sake of argument, that the Company were, in general, common carriers of horses, and that the rule as to negligence of common carriers applies to live animals as well as to goods and merchandises — which, however, Parke, B., questioned in *Palmer* v. *The Grand Junction Railway Company*, (8 Mee. & W. 749; 3 Jur. 559,) — still the Company had a right to enter into a more limited contract with the plaintiff upon accepting these horses; *Nicholson* v. *Willan*, (5 East, 507); and when they did, the plaintiff was bound to rely on that contract in his declaration. *Latham* v. *Rutley*, (2 B. & C. 20), where Abbott, C. J., says, (p. 22), "The result of all the cases is, that if the carrier only limits his responsibility, that need not be noticed in pleading; but if a stipulation be made that, under certain circumstances, he shall not be liable at all, that must be stated.") The same rule of pleading is in *Tempany* v. *Burnand*, (4 Camp. 20); *Howell* v. *Richards*, (11 East, 633.) But the distinction pointed out by Abbott, C. J., is more than a distinction in pleading: it is the test to show whether the common law liability is or is not waived by the parties, and whether they have or have not entered into a new contract upon delivery and acceptance of the articles in question. It has been said that the stipulation, proved by the defendants in this case at the trial, did not alter the effect of the contract stated in the declaration; and that, notwithstanding the stipulation, the defendants were liable for the accident which happened to the horse; and *Lyon* v. *Mells* (5 East, 428) was cited. But what was proved there was only a notice, and a general notice: here the note proved was proved to contain the terms of a special contract entered into between the plaintiff and the

defendants with respect to the acceptance of a particular kind of goods. The defendants, supposing them to be common carriers, had a right to make that special contract of acceptance. *Harris* v. *Packwood*, (3 Taunt. 264.) [*Coleridge, J.* — The argument is, that, although by the terms of the note, you may have relieved yourselves from liability for some accidents, yet you could not and did not relieve yourselves from the liability of providing a carriage fit and safe for any horse you undertook to carry; for instance, for this young and spirited horse.] But the declaration states that we were liable for all accidents; that we insured, as common carriers generally do, to deliver the horse safely and securely at Watford. Now, the special contract proved, clearly excludes some if not all accidents; and, if so, the defendants were entitled to the Judge's direction to that effect. But it is said, that there was no special contract at all in this case; that the ticket delivered to the plaintiff's servant was a notice only, and not a paper containing the terms of a particular contract; and that the Carriers' Act, 11 Geo. 4, & 1 Will. 4, c. 68, does not allow the defendants the benefit of this notice. It was said the notice mentioned in sec. 2 of that statute, and referred to in sec. 4, is a notice affixed in the office, which this is not. Now, it may be said, that the notices, which, by that statute, have the effect of limiting the carrier's liability, are notices which refer only to goods and merchandise; and then this ticket, supposing it to be a notice, is not within the statute at all, but is under the general law, and limits the defendants' liability as a notice, as much as if it were a term of a particular contract. (Story on Bailments, § 760.) But, whatever be the interpretation of that statute in those respects, the answer to the objection is, that, according to Lord Tenterden's test in *Latham* v. *Rutley*, the stipulation in this note, that, under certain circumstances, the defendants would not be liable at all, is the term of a new special contract, and is within the 6th and not within the 2d and 4th sections of the statute. As to the issue, developed by the third plea, they were equally

entitled to succeed upon it, for it sets out the contract in the terms of the ticket. The stipulation, which the other side would interpolate into the contract, is necessary to be implied, they say, from the terms of the ticket; then it is also to be implied necessarily from the terms of the pleading; and the party pleading is not bound to set out that which must be necessarily implied from the terms in which he pleads. Either, then, the stipulation is not in the contract, or it is in the pleading. In either case, the defendants are right. But in all this it is supposed that the Company were generally common carriers of horses, and that they undertook on this occasion to carry horses, though on this occasion they limited their general liability by a special contract with the plaintiff. The terms of the ticket, however, which is made out for owners and servants as well as horses, and the evidence that the plaintiff and his servant in this case accompanied the horses, show that the defendants never undertook to carry horses at all. The company only let out carriages or trucks to the owners of horses, who, by themselves or their servants, had the care of the horses. But if the horses were in the care of the plaintiff and his servant, which they were, since they accompanied them, it is clear that the plaintiff did not make out his caseeven upon the general issue. *The East India Company* v. *Pullen*, (2 Str. 690.)

Cur. adv. vult.

Lord Denman, C. J., now delivered the judgment of the Court. — This was an action on the case to recover damages for the loss of a horse, by reason of the insufficiency of one of the carriages of the defendants, on which the horse was conveyed from York to Watford.

His Lordship, after stating the pleadings and the evidence, as stated above, proceeded: — It appears to be clear, that the terms contained in the ticket, given to the plaintiff at the time the horses were received, formed part of the contract for the carriage of the horses between the plaintiff and the defendants; and that the allegation in the declaration, that the defendants received the horses, *to be*

safely and securely carried by them, which would throw the risk of conveyance upon the defendants, is disproved by the memorandum at the foot of the ticket; and the alleged duty of the defendants safely and securely to carry and convey the horses would not arise upon such a contract.

It may be, that, notwithstanding the terms of the contract, the plaintiff might have alleged, that it was the duty of the defendants to have furnished proper and sufficient carriages, and that the loss happened from a breach of that duty; but the plaintiff has not so declared, but has alleged a duty which does not arise upon the contract, as it appeared in evidence.

The rule, therefore, will be absolute.—*Rule absolute to enter a nonsuit.*

Recent American Decision.

Supreme Court of New York, Fifth Judicial District.

HASKALL et al. *v.* THE MADISON UNIVERSITY, and the BAPTIST EDUCATION SOCIETY of the State of New York.

An answer, unless verified by affidavit, cannot be made the foundation for a motion to dissolve an injunction, but upon an answer, *with affidavits attached*, such a motion may be made.

Whether it is competent for an University Board to pass a contingent resolution of removal, to become absolute upon the decision of a certain important question by a committee appointed for that purpose, *quære*.

By the first section of the Act of Assembly of April 3, 1848, the trustees of the Madison University were authorized to change the location of the institution from Hamilton to Syracuse, Rochester, or Utica, provided that within one year they should file a resolution of the board, electing at which place said university should be located. *Held*, that a resolution to remove "*to Rochester or its vicinity*" was not within the terms of this act, and therefore, any location filed in pursuance of such a resolution, was not a compliance with the conditions of the act.

The University Board passed a resolution, by which it was declared "expedient to remove the Madison University to the City of Rochester, *or its*

vicinity. The said removal to be conditioned that legal difficulties interposed be found insufficient; and that S. B. B., J. H., and R. K., be a committee to investigate such difficulties, and hear arguments. Upon their favorable report, such removal to be unconditional." *Held*, that if the committee never *met*, but conferred by letter, or at casual interviews, their power was not well executed.

Whether the filing of a resolution of removal could be delegated to a committee, *quære*.

In case of an illegal attempt to remove the university, the original subscribers to the fund *on the condition* "that the Baptist Education Society should locate permanently a Literary and Theological Seminary in the Village of Hamilton," are entitled to an injunction to prevent such removal. Whether a similar remedy would exist to prevent the removal of the University which had become consolidated with the Theological Seminary, *quære*. But if an attempt be made to remove the university against law, the subscribers to the fund are clearly entitled to equitable relief in the nature of an injunction.

THIS was a motion at chambers to dissolve an injunction.

H. Harris and S. Stevens for the motion.
T. Jenkins and C. P. Kirkland, contra.

GRIDLEY, J.— This is an application to "vacate or modify" an injunction granted by the Hon. W. F. Allen, one of the Justices of this Court, and is founded, as the notice states, upon the complaint, and the answer of the Madison University. Upon this notice, the plaintiff's counsel insist,— 1. That the motion must be denied, for the reason that an answer, unless verified by an affidavit, cannot be made the foundation of a motion to dissolve an injunction. That position is undoubtedly correct; but I think it would be too narrow a construction of this notice, to hold that, by the term "*answer*," the affidavits by which it was verified, were not intended to be included. The answer *and the affidavits attached*, were served *with* the notice, and upon *all* those papers the application must be deemed to be made. 2. The counsel insist that if the motion is considered as made on the answer *and the affidavits*, that they have a right to read affidavits, other than those attached to the complaint, on which the injunction was granted. The determination of this question must depend on the con-

struction of certain provisions of the code of procedure. By the last clause of the 225th section of that instrument, it is declared, that "The application may be made on the complaint and the affidavits on which the injunction was granted; OR upon affidavits on the part of the defendant, *with*, or *without* the answer." It is proved by section 226, that "If the application be made upon *affidavits* on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the injunction was granted." It is argued by the counsel for the defendants that the legislature merely intended by the foregoing provisions to enact the old rule which regulated the practice in the Court of Chancery on motions of this character. (See 1 Hoff. Pr. 360, 361; 1 J. Ch. R. 211; 2 id. 202; 4 id. 26, 173, 497; 1 Paige, 100; 4 id. 111.)

It will be borne in mind that, by the old practice, an answer duly verified was *evidence in the cause;* and when responsive, would prevail over the allegations in the bill, unless contradicted by testimony equivalent to that of two witnesses. Under the present practice, the answer, *as such*, is not evidence at all. The injunction is granted only on the "*affidavit*" of the plaintiff, or some person in his behalf. (Sec. 220.)

For this reason there is no provision in the code for moving to dissolve an injunction on the answer alone. The language of the enactment is not, "on the answer *with* or *without* affidavits;" but "on affidavits of the defendant *with* or *without* the answer." Unless, therefore, the defendant moves solely "on the complaint and the affidavits on which the injunction was founded, he *must* move on affidavits. It is true, he may add to his affidavits the answer; and so far as it is *positively verified*, it takes the place of an affidavit. Unless it has been duly verified, however, it cannot be made the ground of a motion; and then only in the character of an affidavit. If I am right in the conclusion at which I have arrived on this point, then the affidavits offered by the plaintiffs are admissible by the very terms of

the 226th section of the code. The case of *Howell* v. *Bates*, recently decided by Justice Mason of the Superior Court, and reported in the January number of the Legal Observer, to which I have been referred by the counsel, contains no principle in conflict with these views.

The injunction granted in this cause was twofold; prohibiting the Madison University from removing its site from Hamilton, and from using the funds of the Baptist Education Society otherwise than in pursuance of the contract between the two corporations set out in the complaint; and also prohibiting the Baptist Education Society from removing its Literary and Theological Seminary from Hamilton, and from using its funds otherwise than in accordance with the provisions of the aforesaid contract. No motion is made on behalf of the Baptist Education Society, nor is any question made on this application concerning the right of the plaintiffs to insist upon the continuance of the Theological Seminary at Hamilton.

The only point, therefore, to be considered, is the right of the Madison University to remove its site to Rochester.

By the first section of the Act of April 3, 1848, [Laws of 1848, p. 279,] the trustees of the University were authorized to change the location of the Institution from Hamilton to Syracuse, Rochester, or Utica, provided "They should, within one year from the passage of the act, file with the secretary of state a resolution of the board, adopted by a majority of all the members constituting said board, electing to make such change, and determining at which of said places said University should be located."

The plaintiffs allege in their complaint, that the condition upon which the right to remove the University was thus made to depend, was never performed. And in proof of this allegation they further state, that on the night of the 14th of August, 1848, the University Board passed two resolutions in the following words:

"*Resolved*, — The Board of the Education Society concurring, — That it is expedient to remove the Madison University to the city of Rochester *or its vicinity*. The said removal to be conditioned that legal difficulties

interposed be found insufficient; and that Seneca B. Burchard, Ira Harris, and Robert Kelly, be a committee to investigate such difficulties, and hear arguments. Upon their favorable report, such removal to be unconditional.

"*Resolved*,— That whenever such satisfactory report shall be received, and the removal made unconditional, the officers of the Board be authorized to file, according to the provisions of the statute, the following resolution in the office of the Secretary of State: 'Resolved that the Madison University do hereby elect, pursuant to the authority given them, to remove to the city of Rochester *or its vicinity*.'"

The plaintiffs also allege in their complaint, that notwithstanding a paper purporting to be a resolution electing to remove the University to Rochester, omitting the words "*or its vicinity*," was filed within the time proscribed by the act, in the office of the Secretary of State, yet that no such resolution was actually passed by the Board.

The plaintiffs also further allege in their complaint, that the members of the committee appointed, in and by the first of the above recited resolutions, never met together to consult upon the subject committed to them; never examined the same; never heard any arguments thereon; and never made any report pursuant to the requirement of the resolutions. In confirmation of these statements, the complaint proceeds to allege that Robert Kelly, one of the members of the committee, wrote to Mr. Harris or Mr. Burchard, the other members of the committee, giving an explicit direction to file the resolution for removal without taking any measures to ascertain whether there were legal objections to said removal or not; and that said Kelly actually took no measures to ascertain the same. In addition to this, it is stated that Mr. Burchard communicated to Mr. Harris an express refusal to consent that the resolution be filed, unless Chancellor Walworth and Judge Bronson (if he would act) and if Judge Bronson would not act, then Chancellor Walworth and the Hon. John C. Spencer should give an opinion that there were no legal difficulties in the way of a removal; and that no such opinion was given by those gentlemen.

It now becomes important to inquire how far the answer controverts these specific charges in the complaint; for

notwithstanding they may be made on information and belief only, unless they are *specifically contested*, they are, by the 168th section of the Code, to be taken as true. The answer sets out the foregoing resolutions as the same are stated in the complaint, except that the words "*or its vicinity*," immediately following the word "*Rochester*," are omitted; and then "*admits*" that the resolutions; as set out in the answer, were passed by the University Board at the time alleged in the complaint. The answer "admits" and "alleges" that the last of the said resolutions was filed on the 25th day of January, 1849, after the officers of the board had received a report, favorable to the removal of the University, from the said committee. In a subsequent paragraph of the answer, it is denied that the said committee did not report pursuant to the request of the said resolutions, and also that the said Burchard did not concur in the report. This is the sum of what is found in the answer, in relation to the specific allegations in the complaint concerning the resolutions of removal, and the manner in which the committee appointed by the Board performed the duty assigned to them.

It will be perceived that several questions arise upon the above issues presented by the pleadings.

1. Whether it was competent for the University Board to pass a contingent resolution of removal, to take effect and become absolute, upon the decision of a certain important question by a committee appointed for that purpose. In other words, whether the Board could delegate the power to determine the only question upon which the removal was made to depend, to any other body than themselves. Whether a resolution, making the removal depend on the opinion of a committee of three, as to the existence of legal difficulties in the way of removal; and on the further fact, whether the report of such committee should be satisfactory to the officers of the Board, would be valid without a subsequent ratification by the Board of the acts of its agents.

2. Whether the resolutions passed on the night of the

14th of August, 1848, were resolutions for a removal of the University to "*Rochester*," or in the alternative *to Rochester "or its vicinity.*" For if the resolution contained the latter clause, most clearly the condition of the act was not complied with. The vicinity of Rochester, may mean a location within a mile beyond the limits of the city, or in any of the neighboring towns.

3. Whether the committee ever performed the duty assigned to them in *such a manner* as to confer on the officers of the Board the power to file the resolution of removal. For if they did not, then the act of filing the resolution was unauthorized and void.

I. Upon the first of these questions I have a strong impression; but as the question has not been argued by counsel, and as it may hereafter become material upon the final hearing of the cause, I withhold the expression of any opinion upon it.

II. Upon the second question, it is to be borne in mind, that, though the affidavit of Mr. Humphrey is appended to the answer, he does not profess to have any knowledge of the proceedings of the University Board in August, 1849, nor of the resolutions passed at that meeting. The answer is, therefore, as to this point, verified by a single affidavit only. Now to oppose this allegation in the answer, and to show that the resolution, as passed on the night of the 14th of August, 1848, did provide for the removal to Rochester "or its vicinity," the plaintiffs rely, —

1st. On the affidavit of Professor Eaton. This gentleman swears that he was present, when the resolutions in question were passed by the University Board, late in the night of the 14th of August, 1848, and heard the same read aloud before the Board; and he testifies positively that they did contain the words, "or its vicinity," immediately following the phrase "city of Rochester." He also explains the reason why the resolutions were made to take the form of this alternative. According to his statement, an objection was raised in the course of the discussion, that a city was an unsuitable location for the institution:

whereupon it was replied, that the location need not necessarily be confined to the city, but might be fixed at any place in its vicinity; and the resolutions were drawn to conform to this suggestion.

2d. On the affidavit of Professor Spear, who was present during all the discussions upon the resolutions, and at the time when the same were passed; and this witness also positively states, that the resolutions, as passed, contained the alternative of a removal "to the city of Rochester or its vicinity."

3d. A copy of the original resolutions, as they passed the University Board, under the hand of the Rev. John H. Raymond, communicated officially by said Raymond, as Secretary of the University Board, to the Rev. Z. Freeman, Assistant Corresponding Secretary of the Baptist Education Society. These resolutions are proved by Professor Spear to be in the proper handwriting of the Secretary of the University Board. They bear date on the 14th of August, 1848, and contain the all-important words, "to the city of Rochester or its vicinity."

Now whatever explanation the Madison University may be able, hereafter, to give of this transaction, and what may be the balance of evidence upon this point on the hearing of the cause, when all the testimony shall have been taken, I will not undertake to say; but it is quite clear, that upon the papers before me upon this motion, the answer is completely overthrown. We are brought to the inevitable conclusion (in the absence of all explanation) that the resolution has been shorn of the fatal words since it was passed by the Board.

III. *Upon the third question*, I am also of the opinion that the weight of evidence is with the plaintiffs. This committee was composed of three members. A most important trust was committed to them. The first resolution made the removal to depend on the condition that "legal difficulties interposed should be found insufficient," and this committee was appointed "to examine said difficulties, and to hear arguments, and to report" their decision as to

the existence of these difficulties. And it was only on a favorable report by this committee, on the existence of these legal difficulties, made to the officers of the Board, that the latter were authorized to file the resolution of removal. It was the duty, therefore, of *all the members* of this committee to have met together, examined these legal difficulties, and heard arguments concerning them. They were a tribunal, constituted by the Board, to decide, in the place of the Board itself, a most material question; one, on the determination of which, the decision of the Board on the subject of removal was to depend. The plain language of the resolution, as well as the rules of law, which declare what shall be necessary to render the execution of a power or trust of this description a valid act, required the members of this committee to meet together, examine and decide the important question which the Board had delegated to their judgment and discretion.

The question now arises, whether these requisites to a valid execution of the power conferred by the resolution were ever complied with. The complaint charges that the committee never met together for consultation; and the answer leaves that particular charge unanswered. The answer is also equally silent as to the fact of their hearing arguments and examining the question submitted for their decision. The answer does indeed aver that the officers of the Board "received a report favorable to the removal of the University." But it does not state whether *one* member signed the report in behalf of *all*, or whether it was signed by each member of the committee for himself; nor whether the report found that no legal difficulties in the way of removal existed; or whether it was (in the words of the answer) merely "favorable to the removal of the University" — nor whether Mr. Burchard concurred in the report, and assented to the filing of the same before or after the report was filed. Nor does it contain one word in reply to the specific charges in the complaint concerning the refusal and absolute omission of Kelly to inquire concerning the existence of legal difficulties, nor concerning

Burchard's refusal to consent to filing the resolutions till Messrs. Walworth and Spencer should have expressed an opinion that no legal difficulties existed. I have suggested these omissions of the answer, and the want of particularity in its statements, in no hypercritical or censorious spirit; but merely to introduce and show the application of the evidence furnished on these topics by the opposing affidavits. Mr. Burchard was one of the members of this committee, and it was he who made the affidavit verifying the answer. Perhaps the omissions I have adverted to, may be accounted for, when it is stated thas Messrs. Eldredge and Babcock both swear in their opposing affidavits to sundry conversations with Mr. Burchard, in which he stated that the members of the committee never met together for consultation — that he went to Albany for the purpose of attending such meeting, and saw Mr. Harris; but that Mr. Kelly was not there — that he was informed by Mr. Harris that he had received a letter from the said Kelly, declaring that he could not attend the meeting; but that he was *in favor of filing the resolution, whether legal difficulties existed or not.* Whereupon he, the said Burchard, stated to Mr. Harris that he, as one member of the committee, would never consent to the filing of the resolution, unless an opinion was first obtained from Chancellor Walworth, and Judge Bronson, if he would consent to give an opinion, and if not, then from Chancellor Walworth and the Hon. John C. Spencer, that there were no legal impediments to the removal of the Institution.

Now, again, — I desire to say that I will not allow myself to speculate upon what may be the character and complexion of the proof at the hearing; I cannot, however, upon the papers before me, resist the conclusion that the committee did not so discharge the trust delegated to them as to authorize the filing of the resolution of removal — even admitting that a trust of this kind were capable of being delegated at all. If I should dissolve this injunction, and the University, with the Professors and funds of the Education Society, should be removed to the

city of Rochester — and on the hearing of the cause, it should be found and determined that the right to remove did not exist by law, then a great misfortune would have fallen upon both Institutions; and a mischief would have been produced, which, in the language of the authorities, would be irreparable.

I must therefore hold, that the condition on which a removal of the University was authorized by the Act of 1848, was not complied with; and therefore that such removal would be sanctioned by no legal right or authority.

The only remaining question to be decided is, whether, conceding the removal of the University to be an illegal and a wrongful act, the *plaintiffs stand in a situation* to invoke the aid of this Court to prevent it. A proper disposition of this question will involve the consideration of several others.

1st. Whether they have a right to restrain the removal of the Theological Seminary. Looking then into the allegations in the complaint which are not denied, and for the purpose of this motion must be taken as admitted, we find the following statement of facts: That after the incorporation of the Baptist Education Society in the year 1819, a committee was raised by the Board, to select a site for the Seminary which was to be erected to carry out the objects of the Society. That previous to the determination of this question, numerous subscription papers were circulated, and large sums were subscribed, in the aggregate amounting to several thousand dollars, *on the condition*, as expressed on the face of the papers, "that the Baptist Education Society should locate *permanently* a Literary and Theological Seminary in the village of Hamilton;" and that the plaintiffs were original subscribers to a considerable amount upon the like condition — that the committee, influenced by these subscriptions, made a report favorable to the selection of Hamilton as the site of the Seminary. Whereupon, the Education Board, after receiving the report of the committee, *decided to locate their Seminary in the village of Hamilton*, PERMANENTLY, on condition that the sum of six

thousand dollars should be paid to the institution in the manner particularly stated in the resolution. That, afterwards, six gentlemen, of whom the plaintiff Haskall was one, executed to the Society a covenant by which they agreed, in consideration of the *permanent location* of the Seminary at Hamilton, and of an assignment of the subscriptions aforesaid, to furnish to the Society in buildings, and board of pupils, what was deemed equivalent to $6000. This covenant was accepted by the Society, and was afterwards performed (with some changes in the matter of buildings, agreed to by the Society) by the payment of the full sum of $6000, and thirty-two dollars and seventy-two cents over. This sum was accepted by the Society in full satisfaction of the covenant aforesaid, and in that manner the location of the Seminary was made *permanent at Hamilton*, so far as the solemn agreement of the contracting parties, and the payment of a large consideration, by the covenantors, on the faith of such agreement, could make it so. What, then, is the true interpretation of the word "*permanent*," as used by the contracting parties in this agreement? Does it mean that the Seminary was to be located at Hamilton, while the Trustees chose to keep it there, and no longer? Did the contracting parties contemplate that the Board would have the power and right to remove the Institution in one year, or in ten years, if they should see fit? If this be the true construction of the agreement, then the word "*permanent*" is without significancy, and adds nothing to the meaning of the sentence; for if the contributors of the $6000 had merely stipulated for the *location* of the Institution at Hamilton, Hamilton would have continued to be the location, in the contemplation of all parties, until some good reason should arise, sufficient, in the judgment of the Trustees, to justify a removal. The parties, therefore, meant something more than this. I acknowledge that the word "*permanent*" does not always embrace the idea of *absolute perpetuity;* as when an individual is said to have selected a particular place as his permanent, in opposition to a temporary resi-

dence. But when the citizens of a locality give large sums of money, on condition that an Institution of learning shall be *permanently* located there, the word has a different meaning. When such a stipulation is incorporated into an agreement, it means, that the place agreed on shall be the site of the Institution as long as the Institution endures. Those who part with their funds upon the faith of such an agreement, look to the enduring benefits to be derived from such an Institution by themselves, their successors, and the citizens of the entire locality, while the Institution shall continue to dispense its varied blessings. And when they have secured the permanent enjoyment of these advantages by a solemn covenant, they have a right to invoke the aid of this Court, to compel a faithful performance of such contract by the trustees of the corporation, and to protect themselves against the consequences of a violation of the trust, by a removal of the Institution, or a perversion of its funds in such a manner as to defeat the fair intent of the parties to the agreement.

2d. Conceding that the plaintiffs have a right to prevent the removal of the *Theological Seminary*, I think they have also the right to restrain the removal of the *University*. I do not rest this opinion on the ground, that by the provisions of the charter of the University alone, that corporation became consolidated with, or the necessary adjunct of, the Baptist Education Society. I intend to express no opinion on that point. Upon the facts stated in the complaint, however, no one can doubt that such was the intention of those who procured the passage of the Act of incorporation. However this may be, there is no doubt that the Legislature contemplated a practical union by contract, of the two corporations, to promote the joint objects of both. By the 9th Sec. of the Act, (Laws of 1846, p. 33,) the Education Society was authorized to make such arrangement with the University for the transfer of the property of the Society, or any part thereof, either absolutely or conditionally, to the University, as the Society should deem proper. Such an arrangement was made, by which the use of the property

of the Society was transferred to the University, and mutual stipulations were entered into for the promotion of the objects of both corporations. It cannot be pretended that this contract can be performed, while the University is at Rochester and the Theological Seminary at Hamilton. The entire scope of the agreement, with its various subordinate provisions, contemplated a practical union in the enterprise of conducting the business of the two Institutions, at Hamilton. To accomplish this purpose, the Education Society granted to the University the use of its College edifices, its library, philosophical apparatus, and its other personal property and funds, without the power to reclaim any part of this property until two years after a notice given, with the reasons assigned for the rescinding of the contract. In consideration of this grant, the University undertook to sustain the whole expense of instruction in both the Literary and Theological departments, under the charge of *one Faculty*. It seems to me that while this contract subsists, no Statute could unite the two Institutions in closer bonds than this agreement, to which the trustees of the respective corporations were parties.

But it is said that, so far as this contract bound the University to Hamilton, it has been released by the Education Board. Passing over the objections made to the regularity of this proceeding, it is sufficient to say, that that resolution was passed in contemplation of a regular and legal removal of the University, on a performance of the conditions prescribed by the Act by which the right to remove was given. The language of the resolution shows this to be so; and the release was only to take effect "*when the University should be prepared to quit Hamilton.*"

This expression obviously means, when the University should be prepared to remove under the provisions of the Act which conferred the right of removal; and not when it had forfeited and lost that right, and was prepared to remove in defiance of law.

This construction is placed beyond the shadow of a doubt, when we advert to the first resolution of the Univer-

sity Board. That resolution, by express terms, was made dependent on the concurrence of the Board of the Education Society; and the resolution of the latter Board consenting to the removal, was the act of concurrence contemplated by the University Board. But the resolutions of the University Board look *only* to a removal in pursuance of, and in compliance with, the provisions of the Act. The consent of the Education Board therefore was only given, as both parties understood it, to a legal removal under the Act, and not otherwise. Again, this resolution was passed in contemplation of the removal of the Theological Seminary to Rochester, also, and was followed afterward by a resolution to that effect. In addition to this, by a careful reading of the resolution, it appears that no part of the contract was abrogated but that which confined the University to Hamilton. It was understood by both parties that the contract was yet to be carried out with this exception — that the place of performance was to be Rochester, and not Hamilton. The license to the University to leave Hamilton, if not originally void, has become so by the present incapacity of that Institution to change its location under the law, and by the total failure of the consideration on which it was granted. The removal of the University has become incompatible with the fulfilment of the contract which still subsists in full force. Although such removal would not involve the removal of the Theological Seminary from Hamilton, it would leave that Institution destitute of all power to carry on its educational operations. The University has a valid grant of its property, irreclaimable except upon two years' notice. The removal of the University and the funds, would be as fatal to the interests of the Seminary at Hamilton, as if the Institution were itself removed, or its charter repealed. For this reason the plaintiffs, (especially Haskall) who have a right to prevent the removal of the Literary and Theological Seminary from Hamilton, have the same right to prevent the removal of the University; inasmuch as during the continuance of the contract of Union, the removal of the latter would ren-

der the former Institution incapable of keeping up its establishment and accomplishing the objects for which it was founded. Upon this ground, I am of the opinion that Haskall has the right to restrain the Trustees of both Corporations from the prosecution of an enterprise that, if carried out, would be fatal to the interests of the Seminary at Hamilton.

Having come to this conclusion, I desire, for the purpose of preventing any misconstruction, to say, that I by no means intend to impute a design to any of the parties to commit a wrongful or injurious act. They have, doubtless, acted in entire good faith. I speak only of the legal character of certain acts which have become wrongful, because not warranted by law. I will also add, that my views and reasonings are based solely on the state of facts which is presented by the pleadings and affidavits read on this motion. It is possible that the proofs, when taken, may present a very different case. But upon these papers the motion must be denied, and upon grounds that seem to me unanswerable until a different state of facts shall be made to appear.

Miscellaneous Intelligence.

JUDGE STORY AND THE LAW SCHOOL AT CAMBRIDGE. — We are indebted to Charles Sumner, Esq., for a copy of his valuable report to the Overseers of Harvard College, upon the condition of the Law School. There is much in it which is worthy of attention. But we have been particularly struck with the recital of the eminent services rendered to the Law School by the late lamented Mr. Justice Story. The following passage contains a merited tribute to this distinguished jurist :

" In reviewing the history of the School, the Committee, while remembering with grateful regard all its instructors, pause with veneration before the long and important labors of STORY. In the meridian of his fame as a Judge, he became a practical teacher of jurisprudence, and lent to the University the lustre of his name. The *Dane Professorship*, through him, has acquired a renown which places it on the same elevation with the *Vinerian Professorship* at Oxford, to which we are indebted for the Commentaries of Sir William Blackstone. These 'twin stars' shine each in different

hemispheres, but with rival glories. Nor is this the only parallel; for Viner, like our Dane, endowed the professorship, which bears his name, from the profits of his immense Abridgment of the Law. In the performance of his duties, Professor Story prepared and published the most important series of juridical works which have appeared in the English language in our age, embracing a comprehensive treatise on the Constitution of the United States, a masterly exposition of that portion of international law known as the Conflict of Laws, and commentaries on Equity Jurisprudence, Equity Pleading, and various branches of Commercial Law.

"The character of his labors, and their influence upon the School, will appear from an interesting passage in his last will and testament, bearing date Jan. 2, 1842. After bequeathing to the University several valuable pictures, busts, and books, he proceeds as follows: 'I ask the President and Fellows of Harvard College to accept them as memorials of my reverence and respect for that venerable institution at which I received my education. I hope it may not be improper for me here to add, that I have devoted myself as Dane Professor for the last thirteen years to the labors and duties of instruction in the Law School, and have always performed equal duties and to an equal amount with my excellent colleagues, Mr. Professor Ashmun and Mr. Professor Greenleaf, in the Law School. When I came to Cambridge, and undertook the duties of my professorship, there had not been a single law student there for the preceding year. There was no law library, but a few old and imperfect books being there. The students have since increased to a large number, and, for six years past, have exceeded one hundred a year. The Law Library now contains about six thousand volumes, whose value cannot be deemed less than twenty-five thousand dollars. My own salary has constantly remained limited to one thousand dollars, — a little more than the interest of Mr. Dane's donation. I have never asked or desired an increase thereof, as I was receiving a suitable salary as a Judge of the Supreme Court of the United States; while my colleagues have very properly received a much larger sum, and of late years more than double my own. Under these circumstances, I cannot but feel that I have contributed towards the advancement of the Law School a sum out of my earnings, which, with my moderate means, will be thought to absolve me from making, what otherwise I certainly should do, a pecuniary legacy to Harvard College, for the general advancement of literature and learning therein.'

"It appears from the books of the Treasurer, that the sums received from students in the Law School, during the sixteen years of his professorship, amounted to $105,000. Of this sum, only $47,200 were spent in salaries and other current expenses of the School. The balance amounting to $57,200, is represented by the following items, viz:

Books purchased for the Library and for students, including about $1,950 for binding, and deducting the amount received for books sold . .	$29,000
For the enlargement of the Hall, containing the library and lecture-rooms, 1844–5	12,700
The Fund remaining to the credit of the School in August, 1845 . .	15,500
	$57,200

Thus it appears that the Law School, at the time of Professor Story's death, actually possessed, independent of the somewhat scanty donations of Mr. Royall and Mr. Dane, funds and other property, including a large library and a commodious edifice, amounting to upwards of *fifty-seven thousand dollars*, all of which had been earned during Professor Story's term of service. As he declined, during all this time, to receive a larger annual salary than $1000, and as his high character and the attraction of his name doubtless contributed to swell the income of the School, it will be evident that a considerable portion of this large sum may justly be regarded as the fruit of his bountiful labors contributed to the University.

"The Committee, while calling attention in this way to the extent of the pecuniary benefaction which the Law School has received from Professor Story, have felt it their duty to urge upon the Government of the University the propriety of recognizing this in some suitable form. The name of Royall, attached to one of the professorships, keeps alive the memory of his early beneficence. The name of Dane, attached to the professorship on which Story taught, and sometimes to the edifice, containing the library and lecture-rooms, and also to the Law School itself, attests, with triple academic voice, a well-rewarded donation. But the contributions of Royall and Dane combined — important as they have been, and justly worthy of honorable mention — do not equal what has been contributed by Story. At the present moment, Story must be regarded as the largest pecuniary benefactor of the Law School, and one of the largest pecuniary benefactors of the University. In this respect he stands before Hollis, Alford, Boylston, Hersey, Bowdoin, Erving, Eliot, Smith, M'Lean, Perkins and Fisher. His contributions have this additional peculiarity, that they were munificently afforded, — from his daily earnings, — not after death, but during his own life; so that he became, as it were, the executor of his own will. In justice to the dead, as an example to the living, and in conformity with established usage, the University should enroll his name among its founders, and inscribe it, in some fit manner, upon the School which he has helped to rear."

Judicial Change. We are informed that an Amendment of the Constitution of Pennsylvania has been passed by the present Legislature, and is to be submitted to the people, the effect of which, if adopted, will be to secure an entire new election of Judges by the people. It is said that this movement is more particularly directed against some of the Judges of the Supreme Court; but we do not understand the merits of the controversy.

Law Reform in Mississippi. The Legislature of this State have passed a law abolishing *special pleading* in the practice of the law, and substituting therefor simply *plaint*, *demurrer*, *answer*, and *rejoinder*. The plaint is understood to be similar to our complaint under the code, being merely a succinct and clear statement of the cause of action, no particular *form* being required. Another law was enacted, proposing to submit to

the people, at the next general election, an amendment of the Constitution, abolishing entirely the distinction between Courts of Law and Courts of Equity or Chancery.

Salvage. In the recent English case of *Briggs* v. *Merchant Traders' Ship Loan and Assurance Association* (18 Law J. 178) two points of mercantile law are, for the first time, precisely settled in England. These are, that the owners of goods on board are bound to contribute towards the salvage of the ship, as in a case of general average, and that the shipowner who pays the whole amount of salvage has a lien upon the goods for the amount of the contribution, so as to acquire an insurable interest therein. See *Cox* v. *May*, (4 M. & S. 159); *Scarfe* v. *Tobin*, (3 B. & A. 523); *Bradhurst* v. *The Columbian Insurance Company*, (9 Johns. R. 9); *Columbian Insurance Company* v. *Ashby*, (13 Peters, S. C. R. 331.)

Obituary Notices.

Died at Washington, March 31, Hon. John Caldwell Calhoun, a Member of the Senate of the United States.

In announcing the death of this distinguished Statesman, we are aware that we may somewhat exceed those bounds which a strictly professional journal proposes to itself; for Mr. Calhoun, although possessing in the most eminent degree the intellectual qualifications which are required in the profession of the law, had devoted so large a portion of his life to political affairs, that the lawyer is necessarily lost sight of in the statesman. But this should lead us more especially to do justice to his memory, and to set before the profession, with all the prominence which the public interest in Mr. Calhoun may excite, the leading fact that professional and political eminence are not incompatible.

Mr. Calhoun was of Irish extraction. His father, Patrick Calhoun, emigrated from Donegal, Ireland, and settled with his family in the western part of Pennsylvania. The family afterwards removed to Virginia, but they were driven to South Carolina, upon the defeat of General Braddock. It was in Abbeville District in the latter State, that John C. Calhoun was born, on the 18th day of March, 1782.

Early in life, Mr. Calhoun was placed at an academy in Georgia, then under the charge of his brother-in-law, the Rev. Mr. Waddell. The academy was abandoned shortly afterwards, and he remained with his brother-in-law, engaged in no particular pursuit, and finally returned to his mother, with the fixed intention of becoming a planter. But, at the age of nineteen, through the kindness of an elder brother, who held a lucrative commercial situation in Charleston, and who, appreciating the capacities of his brother, pledged part of his own income to defray his expenses, he was permitted to receive a liberal education. He manifested his gratitude for this act of fraternal affection, by devoting himself to his studies with unfaltering industry. It has been stated, upon good au-

thority, that within two years from the time of commencing the study of his Latin grammar, he was received into the Junior Class of Yale College, where he was graduated in the year 1804, under the Presidency of Dr. Dwight, and at a most brilliant period in the history of the College.

In every University, traditions are transmitted from class to class, touching the college experience of some of the more distinguished alumni. The sons of Harvard are familiar with many reminiscences of the brilliant academical experiences of Adams and Everett, reminiscences with which every freshman is made familiar before his matriculation. But from the enthusiasm with which the name of Calhoun is mentioned by all who have graduated at Yale, we should infer that no student in any University, ever left impressed, as we might almost say, upon the very walls of the recitation rooms, more durable memorials of his greatness than Mr. Calhoun. His peculiarly dialectical turn of mind, and his exquisite conversational power, attracted universal admiration during his undergraduateship at New Haven; nor did his contemporaries fail to accord to him, at that early period, the proud intellectual preëminence which his whole subsequent experience has indicated. We have read and listened to accounts by those who remembered him, of the almost ecstatic enthusiasm which was excited among his class-mates and instructors by the daily scintillations of his powerful intellect.

The success which attended him at College naturally forced him into that profession, which is the refuge of all ambitious men in America, and he passed from New Haven to Litchfield to pursue his professional studies in the then celebrated Law School of Judge Reeve and Mr. Gould. He completed his course at the office of Mr. Bowie, in Abbeville, in 1807, after having spent some time in the office of Chancellor De Saussure, in Charleston.

During his novitiate he gave strong indications of future eminence in his profession, but a conjunction of circumstances having drawn him into the vortex of politics, he was, almost immediately and irrevocably, withdrawn from the practice of the law. While a student at Abbeville, the affair of the Chesapeake and Leopard aroused the popular indignation against England. Mr. Calhoun prepared a report and resolutions presented at a meeting held for considering the subject by the people of his native district. He made a speech upon the occasion, which secured to him, at the next election, a triumphant elevation to the Assembly at the head of the ticket for Abbeville. This commenced his political life. Three years afterwards, in the fall of 1810, he took his seat in Congress; and from that time to the day of his decease, he was almost constantly at Washington in the exercise of some legislative or executive function. He remained six years in the House of Representatives; he then entered Mr. Monroe's Cabinet as Secretary of War, and continued to hold that office during the whole of Mr. Monroe's administration. He was chosen Vice-President of the United States in 1821, and again in 1828. It was during his second term, that the avowed policy of President Jackson, upon the questions of the tariff and the distribution of the surplus revenue, excited

the State and people of South Carolina to an extreme course, and Mr. Calhoun, entering largely into their feelings, conceived and developed the celebrated theory of the Reserved Rights of the States, which finally assumed a tangible form, and resulted in the passage of the "Ordinance of Nullification" by a Convention holden in South Carolina. In due time an Act was passed by the Legislature of the State, to carry this ordinance into effect. The movement was promptly met by President Jackson, with characteristic energy. Proclamations and counter-proclamations, demonstrations both civil and military, followed in quick succession. But the storm subsided, and the ghost of Nullification, once so terrific, vanished from the sight. For Mr. Calhoun's course on this occasion, few, in this part of the country at least, have any sympathy. We refer to it, simply, because it was the most important event of an eventful life, and because, at this momentous crisis, all the energies of his mighty mind were excited into the most intense activity. The unpopularity of his cause did not blind the American people, nor prevent them from bearing an unqualified tribute to that imperial intellect and unquestioned honesty of purpose, without which, efforts whose immediate consequences seemed so terrific, would have been simply ridiculous.

At the most extreme crisis of the Nullication movement, Mr. Calhoun left the Vice-Presidency and took a seat upon the floor of the Senate, as the successor of Governor Hayne. Upon the death of Secretary Upshur in 1844, he was appointed Secretary of State, which office he vacated upon Mr. Polk's accession, the next year. He then retired to private life for a few months, but he was again elected to the Senate in 1845. Excepting during this brief interval, he was constantly in the Senate until his demise.

It is not our intention to review Mr. Calhoun's political course. The time has not yet arrived when such a task can be executed with impartiality. The subject, also, is not to be grasped with our feeble hands. When the present generation shall have passed from the stage, when the petty jealousies and heartburnings of politicians can be forgotten in a just comparison of all that is worthy and elevated in statesmen, when the great measures of the country become known in their remoter consequences, it will be time to approach the subject with that reverence and calmness to which it is entitled. The tributes of respect which were called out in the Senate by Mr. Calhoun's death, impress these truths most strongly upon the mind. No three men have compared, during the last quarter of a century, in political greatness, with Mr. Clay, Mr. Webster, and Mr. Calhoun. They were nearly equal in political age. Each of them has succeeded, during this long period, in retaining entire control over the State which he represented. Each has occupied a prominent position in the executive department of the government. The plastic hand of each has given life and form to the public opinion of America. First of the three, Mr. Calhoun has passed from the scene. It was fit that they who survive should be admonished by his death. And thus it was, that the announcement of his decease was marked by an unusual solemnity. His two great rivals bore witness to his greatness, to his exalted political

course, to the integrity and firmness with which, during so long a period, he had pursued what he conceived to be the true policy of the country. May it be permitted when they, in turn, shall have paid the debt of nature, that some other, equally able and worthy, can bear an equally honest tribute to their disinterestedness and pure public course! "Thus, one by one

'The stars of human glory are cast down,'

and the brightest of those which remain to us, are already not far from that horizon in which they must set."

[The following sketch of Lord Jeffrey is taken from the N. Y. Evening Post, which paper states that it is compiled from the London Athenæum and Morning Chronicle.]

Francis Jeffrey, editor of the *Edinburgh Review*, and "one of the Judges of the Court of Session in Scotland," died at his seat called Craigcrook, near Edinburgh, on Saturday, the 26th of January, in his 67th year. His judicial appointment gave him what in Scotland is called the "paper title" of a lord — in other words, a title by courtesy, one not recognized by the heralds, nor conferring any distinction on his issue, but restricted to himself. He will, however, be best remembered by his early name of Mr. Jeffrey — or as Lord Campbell would have written, — plain Francis Jeffrey.

Thirty years ago — or even forty — the death of Mr. Jeffrey would have been a much more important subject for comment and conversation than it is now, in a ripe old age. No critic ever filled — for good or for evil — a more important position in the world of letters than Mr. Jeffrey filled uninterruptedly for seven-and-twenty years in the literature of the nineteenth century. Whenever the history of English Literature shall be written, his name must always find a place; less prominent, it is true, than that which he occupied in his lifetime, but still one of distinction — not so much from the intrinsic value of his own contributions, as from the particular influence which his writings exercised on the public mind, and on the destinies, for a time, of some of our greatest poets.

The history of his life may be briefly told. He was the eldest son of George Jeffrey, Esq., one of the Court of Session in Scotland, by his wife, the daughter of a Mr. Loudoun, of Lanarkshire — and was born in Edinburgh, on the 23d of October, 1773. He was educated at the High School of his native city, and at Glasgow University, but completed his university education at Queen's College, Oxford. In 1794 he was called to the bar, where he soon became distinguished for the vigor of his eloquence, and the wit and boldness of his invective. He attended debating clubs — spoke with readiness and knowledge; and with no other introduction than his own talents, formed the acquaintance, at the Speculative Society, of Sir Walter Scott, then a young man, busy with his "Minstrelsy," and of the Rev. Sydney Smith and Lord Brougham, both ardent for distinction in the church and at the bar. Acquaintanceship soon ripened into intimacy; and at a late supper, after a debate at the Speculative Society, the *Edinburgh Review* was projected by Smith, and approved

of by Jeffrey and Lord Brougham. Assistants were soon found; and in October, 1802, appeared the first number of the new periodical, under the editorial care of the Rev. Sydney Smith — its original projector, as he is called by Lord Jeffrey, "and long," he adds, "its brightest ornament."

The success of the new review was beyond the expectation of its founders — and after a few numbers, beyond all precedent in publications of a similar nature. Nor is this to be wondered at when we look at the character and variety of its articles, and contrast its vigor and wit with the tame productions of any publication then at all approaching it in matter or in manner. The new review contained the views and thoughts, most fearlessly expressed, of a young and vigorous set of thinkers on some of the most important subjects of the day connected with politics, religion, jurisprudence and literature. The writers flew at all kinds of game; — nor was it difficult to see from the first (what was indeed obvious afterwards) that the politics of the Whig school gave a turn and color to the whole character of the Review. "The Review," said Jeffrey, "has but two legs to stand on; Literature, no doubt, is one of them — but its right leg is Politics."

Mr. Sydney Smith was the editor of the first three numbers; and would, no doubt, have continued his editorial care, had not his views of promotion in the Church called him away from Edinburgh to London. On Mr. Smith's retirement, Mr. Jeffrey took his place; which he continued to fill without interruption till late in the year 1829, when he was elected to the office of Dean of the Faculty of Advocates — a judicial appointment of distinction at the Scottish Bar hardly to be held, it was thought, in conjunction with the editorship of a party review. He continued, however, to write occasionally, not on politics, it is understood, but on literary subjects, from which his judicial functions could not be held by any means to have excluded him.

His retirement from literature as a part of his profession gave him fresh opportunities of distinction in his original pursuit of the law, and in the line of politics to which he seems to have been especially partial. He was elected member of Parliament for his native city, — was listened to in the House more for his reputation's sake, and for what he might say, than for any thing that he said, or for his manner of delivery: — and soon growing weary of attendance even in a "Reformed House" (to which he had so long looked forward, and which he had in a great measure contributed to bring about,) he asked from Lord Melbourne (1834) what he had long coveted — a seat on the Scottish Bench — received the appointment, and retired to Edinburgh and the beautiful scenery of Craigcrook.

He is described by an intelligent biographer as excelling "in acuteness, promptness, and clearness in the art of stating, illustrating and arranging — in extent of legal knowledge — in sparkling wit, keen satire, and strong and flowing eloquence." The same writer, quoting a contemporary critic, the author of "Sketches of the Scottish Bar," says, "Ever quick, but never boisterous nor pushing, Jeffrey wound his way, like an eel, from one bar to the other. If what he had to do was merely a matter of form, it was dispatched in as few words as possible; generally wound up, when

circumstances permitted, with some biting jest. If a cause was to be formally argued, his bundle of papers was unloosed, his glass applied to his eye, and his discourse began without a moment's pause. He plunged at once into the *mare magnum* of the question, confident that his train of argument would arrange itself in lucid order, almost without any exertion on his part. He possessed a most retentive memory, and could proceed from one subject to another at a moment's warning." The same writer quotes the following anecdote of Lord Jeffrey, in his professional character:—"As Mr. Jeffrey sat down one day, at the close of a long and argumentative speech, an attorney's clerk pulled him by the gown, and whispered in his ear, that a case in which he was retained had just been called on in the inner house. 'Good God,' said Jeffrey, 'I have heard nothing of the matter for weeks; and that trial has driven it entirely out of my head; what is it?'—The lad, in no small trepidation, began to recount some of the leading facts, but no sooner had he mentioned the first, than Jeffrey exclaimed, 'I know it,' and ran over, with the most inconceivable rapidity, all the details, and every leading case that bore upon them; and the speech he delivered on the occasion was the most powerful that ever fell from him." "His oratory," the same writer says, "is not commanding; and it is like the frog striving to stretch itself to the size of the ox when he attempts to be impressive; but once, indeed," says the writer before quoted, "we remember an apostrophe, startling, nay commanding, from its native dignity and moral courage. A baronet having brought an action, in which, to gain his point, he had shown his disregard of all moral or honorable restraint, Mr. Jeffrey made the following observations on his conduct:—'My Lords, there is no person who entertains a higher respect for the English aristocracy than I do, or who would be more loth to say any thing which could hurt the feelings or injure the reputation of any one member of that illustrious body; but after all that we have this day heard, I feel myself warranted in saying [here he turned round, faced the plaintiff, who was immediately behind him, and fixing on him a cold, firm look, proceeded in a low, determined voice] that Sir ——— has clearly shown himself to be a notorious liar and a common swindler.'"

A few further particulars of his life, in a notice brief as this must necessarily be, may not be thought unimportant. He was chosen, in 1821, Lord Rector of the University of Glasgow; was twice married, first to the daughter of the Rev. Dr. Wilson, of St. Andrew's—and secondly, to the daughter of Charles Wilkes, Esq., of New York, grand-niece of the famous Wilkes "and Liberty." Let us add (what future ages will no doubt care to know) that he was swarthy in countenance, and diminutive in stature.

Lord Jeffrey is to be looked on as an editor and as an author, not as a Dean of Faculty or even as a Judge. "Envy must own" that he conducted the Edinburgh Review with admirable tact and skill; and that he showed great judgment as to the writers whom he brought about him. He was well supported by men like Sydney Smith, Mackintosh, Brougham,

Horner, Allen, and Hazlitt. His subjects were well chosen for the time, and generally maintained consistent principles, both in politics and in taste; but his great object, it should not be concealed, was to attract attention and to draw readers. We are not, however, to tax him with all the editorial errors of the Review. Let us remember his own apologetical defence to Sir Walter Scott, that he was "a feudal monarch, who had but slender control over his greater barons, and really could not prevent them from occasionally waging little private wars upon griefs or resentments of their own."

Lord Jeffrey's position as editor led him now and then into more than one unpleasant quarrel. Southey, Wordsworth, and Coleridge seldom spoke of him except in terms of hatred and contempt; and his memorable duel at Chalk Farm, in 1806, with Mr. Moore, partly occasioned by a clever application of a passage in Spenser to Tom Little's Poems, will long be remembered by the "Little's leadless pistol" of the "English Bards and Scotch Reviewers," and the contemporary epigram which ends

"They only fire blank cartridge in Reviews."

The quarrels with the Lake School were never made up; but the author of Little's Poems, and the editor of the Edinburgh Review, were afterwards reconciled, and the critic even courted by a friendly dedication.

The great defect in Lord Jeffrey's editorship of the Edinburgh Review was his short-sightedness in appreciating the merits of Scott, Byron, Southey, Wordsworth, Coleridge, and others: He praised Scott for a time; but a cold notice of "Marmion" threw the future novelist into the arms of the Quarterly Review. The criticism on the "Hours of Idleness," though attributed to Mr. Jeffrey at the time, was, as is well known, written by Lord Brougham. Jeffrey himself afterwards praised Byron, and the noble poet was not ungrateful to the critic: witness his "Don Juan"—

"All our little feuds, at least all mine,
Dear Jeffrey, once my most redoubted foe,
(As far as rhyme and criticism combine
To make such puppets of us things below,)
Are over: Here's a health to "Auld lang syne!"
I do not know you, and may never know
Your face — but you have acted on the whole
Most nobly, and I own it from my soul."

We cannot say of Byron on this occasion, what has been said with propriety of another great satirist of our nation, that he was wanton in his attack and mean in his retreat. Mr. Jeffrey, in his capacity as editor, had given the young and noble poet great grounds of provocation; and the satirist repaid censure with ferocious scorn — as afterwards he did praise from the same quarter with appropriate panegyric.

We are now to look on Lord Jeffrey as an author; and it is somewhat singular, we may observe, of one who has written so much, that he is not an author in any other sense than as a critic in a Review. This cannot be said of any of his leading associates, or of any of the opposition writers in

the *Quarterly*,— or indeed of any other writer who has exercised one half the influence in literature that Mr. Jeffrey possessed. His legal as well as his editorial duties must, it is true, have left him very little time for any thing else, and we are not, perhaps, to suppose that he was without the ambition of being an author, or that he wanted leisure for the consideration of any subject of importance. We may attribute more justly his not appearing as an author in his own person to an unwillingness to endanger his high reputation by the production of a separate work, and to some fear of the "wounded great" who were ready to attack him on all sides and with every kind of weapon. He is, therefore, to be judged by the four volumes of his "Essays," or contributions to the Review, which he was induced to collect and revise in the year 1843. These volumes, he tells us, form less than a third of what he wrote in the Review; but they, no doubt, embrace his best productions — those, in short, by which he was willing to stand. His friends would have made a somewhat different selection; one that would have represented the history of his mind and opinion — and that would have thrown more light on the history of critical judgment in this country than can be gathered from his volumes as they at present stand.

It is much to his praise as a man, though little to his early discernment as a critic, that the bitter reviews of Southey, Coleridge, Wordsworth, and others were excluded from his "Collected Essays;" while his eulogies on his favorite poets, Campbell, Crabbe and Rogers, were one and all admitted. He had outlived the resentment or impetuosity of youth with which they were written, as the great writers themselves had outlived the injury which their injustice had done to them; to have inserted them would therefore have only been renewing an unprofitable contest, — and connecting his name even more lastingly than it is likely to be with the great names of the writers whose hostility he both courted and incurred.

These "Essays," it must be confessed — and we have just risen from a re-perusal of some of the best — are not very remarkable productions. They are little distinguished for subtlety of opinion, nicety of disquisition, or even for beauty of style. Though printed uniformly with the contributions to the same Review of Sydney Smith and Mr. Macaulay, they have not made the same impression on the public mind, nor been read with the same avidity. So that, while the Essays of Mr. Smith and Mr. Macaulay are now in fourth editions, the public have been content, till very recently, with a single impression of Lord Jeffrey. Yet his "Essays" will more than repay perusal. His paper on Swift is the best elucidation of the Dean's character that we have yet received; while his articles on Penn and the Quakers exhibit qualities of mind not easily to be found in authors of even greater celebrity.

One of the last acts of Lord Jeffrey's life was, to write a long, and, as we hear, a beautiful letter of thanks to the widow of the Rev. Sydney Smith for the copy of Sydney Smith's Lectures delivered at the Royal Institution, and privately printed by his widow. Lord Jeffrey, it will be remembered, dedicated his "Essays" to his friend Smith.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Alker, Thomas	Lynn,	March 12,	J. G. King.
Atwood, Lewis, et al.	Boston,	" 19,	John M. Williams.
Baker, Amos, et al.	Boston,	" 14,	John M. Williams.
Baker, David P.	Franklin,	" 30,	Francis Hilliard.
Bartlett, Liberty	Williamstown,	" 25,	Thomas Robinson.
Boardman, R. F., et al.	Abington,	" 9,	Welcome Young.
Buttrick, Oliver	Holden,	" 27,	Henry Chapin.
Burt. John O.	Berkley,	" 30,	David Perkins.
Caldwell, Charles	Milton,	" 18,	Francis Hilliard.
Chamberlain, Lowell W.	Charlestown,	" 21,	Asa F. Lawrence.
Clapp, Solomon S.	Northampton,	" 5,	Myrom Lawrence.
Cobb, Charles C.	Warwick,	" 9,	D. W. Alvord.
Crane, Amaziah B.	Worcester,	" 30,	Henry Chapin.
Devereux, George H.	Salem,	" 15,	J. G. King.
Earle, Amos S.	Leicester,	" 27,	Henry Chapin.
Faxon, John G.	Brookline,	" 14,	Francis Hilliard.
Garfield, James W.	Lawrence,	" 27,	J. G. King.
Harris, Isaac	Becket,	" 13,	Thomas Robinson.
Hinkson, Samuel	Boston,	" 4,	John M. Williams.
Hodgkins, Aaron	Wendell,	" 8,	D. W. Alvord.
Holbrook, Willard F.	Norton,	" 19,	David Perkins.
Hollis, Ignatius J.	Lynn,	" 18,	J. G. King.
Holton, Thomas J.	Lynn,	" 15,	J. G. King.
Hoxie, Clark	Sandwich,	" 30,	Zeno Scudder.
Johnson, Thomas W.	Deerfield,	" 30,	D. W. Alvord.
Kelley, William	Methuen,	" 27,	J. G. King.
Liscom, John	Boston,	" 9,	John M. Williams.
Lobdell, Chas. H., et al.	New Bedford,	" 25,	David Perkins.
Loring, William	Sandwich,	" 30,	Zeno Scudder.
Mair, Alexander	Boston,	" 22,	John M. Williams.
Mills, Theodore P.	Chickopee,	" 23,	George B. Morris.
Moulton, Abner	Brookfield,	" 6,	Henry Chapin.
Newcomb, Harley	Marblehead,	" 15,	J. G. King.
Phillips, Daniel	Sutton,	" 28,	Henry Chapin.
Porter, Alfred H.	Charleston,	" 28,	Asa F. Lawrence.
Porter, Henry L.	Westfield,	" 12,	George B. Morris.
Porter, Levi, et al.	Adams,	" 25,	Thomas Robinson.
Randall, Charles	Petersham,	" 23,	Henry Chapin.
Raymond, Joseph	Sterling,	" 5,	Henry Chapin.
Richards, Willard E.	Worcester,	" 5,	Henry Chapin.
Sands, Hiram	Cambridge,	" 18,	Asa F. Lawrence.
Sargent, Sumner	Watertown,	" 4,	Asa F. Lawrence.
Smith, William	West Springfield,	" 11,	George B. Morris.
Shepard, Chauncey	Springfield,	" 11,	George B. Morris.
Sullivan, John	Springfield,	" 13,	George B. Morris.
Tainter, Willard S.	Millbury,	" 23,	Henry Chapin.
Thayer, Stephen H.	Blackstone,	" 20,	Henry Chapin.
Thurston, Samuel	Newburyport,	" 20,	J. G. King.
True, Benjamin	New Bedford,	" 21,	David Perkins.
Warfield, Lewis	Blackstone,	" 1,	Henry Chapin.
Warren, George	Northampton,	" 5,	Myrom Lawrence.
White, George H.	Fitchburg,	" 27,	Henry Chapin.
Wolkins, John F.	Boston,	" 8,	John M. Williams.